Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

SAMUEL BRUCE LOVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Due Process Clause of the United States Constitution prohibits the "unexpected and indefensible" judicial interpretations of the criminal statutes under which Mr. Love was convicted. As stated more precisely, may a judicial officer expand a statute to make criminal conduct that has been declared by Congress to be non-criminal.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 1

Statement of the Case 2

A. The Effect of the Law as Applied by the Lower Courts 2

Reasons for Granting the Writ 3

I. The Decision Of The Court Of Appeals Conflicts With Decisions Of The Supreme Court 3

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) 3, 4, 13, 14, 15

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) 13

Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) 6

Rogers v. Tennessee, __ U.S. __ , 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001) 15, 16

United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954) 13

United States v. Lanier, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 432 (1997) 5

Statutes:

18 U.S.C. § 152 ..... 1, 2

18 U.S.C. § 153 ..... 1, 2

28 U.S.C. § 1254(1) 1

Rule:

FED. R. CRIM. P. 29 2

TABLE OF APPENDICES

Page

Appendix A — Order And Judgment Of The United States Court Of Appeals For The Tenth Circuit Dated And Filed June 20, 2001 ..... 1a

Appendix B — Judgment Of The United States District Court For The Western District Of Oklahoma Dated And Filed February 25, 2000 ... 19a

Appendix C — Order Of The United States Court Of Appeals For The Tenth Circuit Denying Petition For Rehearing Dated And Filed July 10, 2001 ..... 30a

Appendix D — Abstract of Reports Of First Assurance & Casualty Company, Ltd. Filed With The United States Bankruptcy Court For The Western District Of Oklahoma Dated January 19, 1994 And Filed January 20, 1994 ..... 32a

The Petitioner, Sam Love ("Mr. Love"), respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Tenth Circuit opinion (App. A) is an unpublished decision of the United States Court of Appeals for the Tenth Circuit. The docket number of the case was No. 00-6083 and the disposition of the case is reported at 2001 WL 690399 (10th Cir. Okla).

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on June 20, 2001 and is final. A timely petition for rehearing was denied on July 10, 2001 (App. C). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition for certiorari raises only a single question. The answer to the question posed simply requires that this court determine whether the interpretation of 18 U.S.C. §§ 152, 153 placed on them by the District Court and the Court of Appeals comports with the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

A. The Effect of the Law as Applied by the Lower Courts

In the district court, Mr. Love was convicted at jury trial for violating 18 U.S.C. §§ 152, 153. The material portions of those statutes prohibit the concealment and/or embezzlement of assets of a bankrupt estate. The undisputed evidence at the trial of the case, however, was that every transaction that was allegedly "concealed" from the bankruptcy court was actually disclosed in writing to the bankruptcy court in the bankrupt debtor's disclosure statements, statements of affairs and monthly operating reports.

The government's theory of the case and, presumably, the rationale of the district court and the court of appeals in affirming Mr. Love's conviction is that the transactions that were disclosed to the bankruptcy court were somehow concealed from it. Because this position is seemingly so illogical, it is difficult for Mr. Love to further explain it. Suffice it to say that Mr. Love was convicted and sentenced to prison for "concealing" the very transactions that he disclosed in writing to the bankruptcy court.

Although Mr. Love challenged the government's position by pretrial motion, by motion for judgment of acquittal pursuant to FED. R. CRIM. P. 29 and by an appeal to the United States Court of Appeals for the Tenth Circuit, his challenges have been rejected by all lower courts[1]. The effect of his conviction and the affirmance of his conviction by the court of appeals is significant and far reaching. By permitting Mr. Love's conviction to stand, the lower courts have created precedent that has at least two unlikely and highly undesirable effects.

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1. The issue raised in this petition was raised in the lower courts by challenging the sufficiency of the evidence.

First, the interpretation of the bankruptcy fraud statutes placed on them by the lower courts holds, in effect, that the statutes don't mean what Congress plainly said they meant. In other words, Congress affirmatively and plainly stated that a person commits a crime when he or she conceals, or embezzles assets from a bankruptcy court. The corollary of this, however, is that Congress stated in equally clear terms that whoever discloses assets to a bankruptcy court does not commit the crime of concealment. Nonetheless, Mr. Love stands convicted of concealing what he affirmatively disclosed.

Second, an additional effect of the construction placed on the pertinent statutes by the lower courts is to violate the Due Process Clause of the United States Constitution. Under the Due Process Clause, it is a fundamental and "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). As a consequence, the effect of the construction of the pertinent statutes applied by the lower courts violates the Due Process Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT

In this case, the lower courts' decisions suggest that they are in harmony with this court's prior decisions. Although they do not specifically reject any past decision of this court and do not presume to overrule any decision of this court, the holdings of the lower courts impliedly reject or otherwise ignore well established principles and precedents of this court.

In particular, the case of *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) stands for the proposition that a criminal statute must give fair warning of the conduct that makes a person's conduct a crime. Further, *Bouie* states that a construction of a statute that is clearly at odds with the statute's plain language violates the Due Process Clause. In this case, it is axiomatic that a statute that requires disclosure of an asset cannot make that disclosure of the asset to the bankruptcy court a crime. If this effect is given to the statute, a person in bankruptcy faces an impossible circumstance. When confronted with what he should report to the bankruptcy court he must choose between non-reporting which Congress has stated is a crime and reporting, which the lower courts in this case have stated is also a crime. Each course of action would, therefore, result in the commission of a crime leaving no possible non-criminal course of action.

Furthermore, although this court has held that the Ex Post Facto Clause does not apply to the judicial branch of government and, hence, to judicial decisions, this court has stated that the Ex Post Facto Clause "figures prominently" in the fair warning argument. "If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, (the construction) must not be given retroactive effect." *Id.* at 354, 84 S. Ct. 1697.

There are three related manifestations of the "fair warning" doctrine requirement: The first is the vagueness doctrine. The "vagueness doctrine" bars enforcement of a statute which either forbids or requires doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. The second, the "canon of strict construction of criminal statutes," or, alternatively referred to as the "rule of lenity," ensures fair warning by resolving ambiguity in

a criminal statute as to apply it only to conduct that is clearly covered. The third requirement is that, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying novel constructions of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 432 (1997). In each of these circumstances, however, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at relevant time that defendant's conduct was criminal. *Id.*

In this case, it could not possibly have been "reasonably clear" that the acts Mr. Love committed were criminal. Mr. Love's conduct conformed to the laws as they would have been perceived by any reasonable person. It was only the retroactive "judicial gloss" put on the statutes by the lower courts that permitted Mr. Love's conviction to stand. Mr. Love asserts that the "judicial gloss" applied in this case has violated his right to due process of law.

The undisputed evidence in this case reflected that persons other than Mr. Love formed a Bermuda based insurance company named First Assurance Casualty Company ("FACC"). Because it was not domesticated in the United States, FACC was required to have a domestic company to serve as its domestic manager. That company, Impact III ("Impact") was formed by the same persons. Once operations began, Mr. Love was hired as an independent contractor to perform policy administrative services. Although FACC was headquartered in Oklahoma and Texas, Mr. Love's separate company administered FACC insurance policies from its offices in Arizona. Neither the indictment nor the evidence at trial suggested that Mr. Love's services in administering FACC's policies was anything other than exemplary.

Civil insurrection surrounding what are now known as the "Rodney King riots" in Los Angeles in 1992 resulted in FACC having more claims than it could possibly pay. Consequently, it filed for reorganization under Chapter 11 of the bankruptcy code.[2] Mr. Love had no personal responsibility for filing any disclosure statements or operating reports and had very minimal input into the content of them. The government's theory was that Mr. Love, as a member of the alleged conspiracy, was responsible, under a *Pinkerton*[3] theory, for all of FACC's reporting requirements to the bankruptcy court. This prosecution arose from allegations that FACC (and Mr. Love) failed to disclose monetary transactions it conducted to the bankruptcy court. One transaction occurred before the bankruptcy filing and the remainder occurred while FACC was in bankruptcy.

In spite of the allegation that these transactions were concealed from the bankruptcy court, the uncontroverted evidence in this case affirmatively disclosed that the pre-bankruptcy transaction was disclosed to the bankruptcy court in writing in the **monthly operating reports** and that all post-filing transactions were disclosed in writing in monthly operating reports. As a result, Mr. Love was convicted of concealing what was affirmatively disclosed to the bankruptcy court.

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2. One unexplainable aspect of this case is that insurance companies are specifically excluded from the definition of debtors who can file bankruptcy inasmuch as state regulators are the agencies who oversee the rehabilitation and/or liquidation of insolvent insurance companies. Although this jurisdictional issue was repeatedly challenged, the lower courts did not perceive this jurisdictional issue to be an impediment to either the bankruptcy of FACC or the criminal prosecution of Mr. Love.

3. *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

This legal issues presented in this case are reasonably simple. While Mr. Love's assertion that he was convicted of concealing what he affirmatively disclosed may seem somewhat difficult to believe, it is easily verifiable. The following is an abstract of the counts of the indictment of which Mr. Love was convicted alleged the following substantive crimes against Mr. Love.[4]

Count Three

> From on or about October 22, 1993, and continuously thereafter until the present, In the Western District of Oklahoma and elsewhere, Donald Phillip Havener, Jesse Joseph Maynard[5], and Samuel Bruce Love, defendants herein, acting as agents and officers of FACC, knowingly and fraudulently, and with the intent to defeat the provision of Title 11 (the Bankruptcy Code), concealed and caused to be concealed $270,000.00, a material amount of money belonging to the estate of FACC in the proceeding entitled In re: First Assurance Casualty Co., Ltd.,

4. The indictment also contained an allegation that Mr. Love conspired to commit a single object of the conspiracy. The alleged object of the conspiracy was that the defendants conspired to "conceal assets from the bankruptcy court." The conspiracy count will not be discussed at length in this petition for certiorari inasmuch as it would seem to follow that, in the event this court determines that a person cannot legally conceal what he has affirmatively disclosed, the conspiracy count would be defective also.

5. Mr. Havener was a resident of Mexico at the time of his indictment and was not return to the United States for trial. Mr. Maynard was one of the original organizers of FACC and was the debtor-in-possession of FACC until its bankruptcy was converted to a Chapter 7 case. Mr. Maynard was convicted and sentenced for each of the counts referred to herein.

Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 152, and Title 18, United State Code, Section 2.

Count Four

From on or about October 22, 1993, and continuously thereafter until the present, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendant, acting as agents and officers of FACC, knowingly and fraudulently, and with the intent to defeat the provision of Title 11 (the Bankruptcy Code), concealed and caused to be concealed $38,000.00, a material amount of money belonging to the estate of FACC in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 152, and Title 18, United States Code, Section 2

Count Five

On or about November 1, 1993, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendants herein, knowingly and fraudulently transferred and

cause to be transferred $20,000.00 to Impact III, which money belonged to the bankruptcy estate of FACC, and which money came within the scope of defendant Maynard's responsibility as custodian of the debtor estate in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 153, and Title 18, United States Code, Section 2.

Count Six

On or about November 2, 1993, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendants herein, knowingly and fraudulently transferred and caused to be transferred $9,519.13 to Impact III, which money belonged to the bankruptcy estate of FACC, and which money came from within the scope of defendant Maynard's responsibility as custodian of the debtor estate in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 153, and Title 18, United States Code, Section 2.

Count Seven

On or about November 18, 1993, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendants herein, knowingly and fraudulently transferred and caused to be transferred $32,275.31 to Impact III, which money belonged to the bankruptcy estate of FACC, and which money came within the scope of defendant Maynard's responsibility as custodian of the debtor estate in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 153, and Title 18, United States Code, Section 2.

Count Nine

On or about December 9, 1993, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendants herein, knowingly and fraudulently transferred and cause to be transferred $10,000.00 to Impact III, which money belonged to the bankruptcy estate of FACC, and which money came within the scope of defendant Maynard's responsibility as custodian of the debtor estate in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 153, and Title 18, United States Code, Section 2.

Count Ten

On or about December 14, 1993, in the Western District of Oklahoma and elsewhere, Jesse Joseph Maynard and Samuel Bruce Love, the defendants herein, knowingly and fraudulently transferred and cause to be transferred $5,000.00 to Impact III, which money belonged to the bankruptcy estate of FACC, and which money came within the scope of defendant Maynard's responsibility as custodian of the debtor estate in the proceeding entitled In re: First Assurance Casualty Co., Ltd., Case No. 93-16187-TS, in the United States Bankruptcy Court for the Western District of Oklahoma.

All in violation of Title 18, United States Code, Section 153, and Title 18, United States Code, Section 2.

Although the trial lasted in excess of two weeks, the dispositive evidence related to the issue raised by Mr. Love is not complicated. One of the government's primary witnesses against Mr. Love was the FACC bankruptcy trustee, Janice Loyd.[6] The pertinent portion of Ms. Loyd's testimony revealed that the subject transactions were all revealed to her and to the bankruptcy court in FACC's bankruptcy filings.

Q. (By Mr. Love's counsel) And we also know, without spending the time to go back through it, that these checks –as a matter of fact, all of these checks were reported to the bankruptcy court, weren't they?

A. On the monthly operating report; that's correct.

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6. FACC's bankruptcy petition sought reorganization under Chapter 11 of the bankruptcy code. It was later converted to a Chapter 7 liquidation and a trustee was appointed.

Q. And Mr. Love had no control, as far as you know, over when they were reported, did he?

A. He did not prepare – it's my understanding that he did not prepare the operating report; that's correct.

Trial Testimony of Janice Loyd, R.T. at p. 449.

A. I would assume he'd have no responsibility to do that.

Q. I asked you earlier if you knew of any communications in person between the lawyers that filed the bankruptcy, Mr. John Patterson, and my client, Mr. Sam Love, and you said you didn't. So I want to ask you now: Do you know of any communication, whether any letters written or anything?

A. I would have no knowledge of that.

Q. Okay. I asked you earlier about these three, and i want to make sure that we're clear. All six of these were reported on the report to the bankruptcy court?

A. Yes, sir. We've discussed that.

Id. at 455.

These affirmative disclosures were also reflected in various trial exhibits. *See Appendix "B."* Government Exhibit No. 93 revealed the $270,000 pre-bankruptcy transaction for which Mr. Love was convicted. Government Exhibit Nos. 94 and 97 also affirmatively reflected that all other transactions that were allegedly concealed in the remaining substantive counts were actually disclosed to the bankruptcy court in monthly operating statements. Consequently, there is no doubt that Mr. Love was

convicted of concealing from the bankruptcy court money and/or transactions that were affirmatively disclosed to it.

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954).

In analyzing whether the application of penal statutes violate Due Process in cases such as this, there are at least two circumstances which have been condemned by this court. The first is when a statute is so vague that it fails to impart notice of they type of conduct in proscribes. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"). That situation likely is not present in this case.

The other circumstance is when a statute that appears to be precise on its face is unforeseeably and retroactively expanded by judicial construction. *See Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). The latter situation is far more insidious in its application because persons affected by the statute in question are never given the opportunity to weigh the consequences of their conduct.

> The instant case seems distinguishable, since on its face the language of § 16-- 386 of the South Carolina Code was admirably narrow and precise; the statute applied only to "entry upon the lands of another * * * after notice * * * prohibiting such entry * * *." The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in Lanzetta, or to "guess at (the statute's) meaning and differ as to its application," as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Bouie v. City of Columbia, 378 U.S. 351-52, 84 S. Ct. at 1701-02.

In this case, the statutes under which Mr. Love was charged were very direct and easily understood. One prevents concealment of the assets of a bankruptcy estate. The other prevents the embezzlement of the assets of a bankruptcy estate. Neither of these statutes are difficult to understand and seem to state in simple terms the type of conduct that is proscribed. Nonetheless, Mr. Love's conduct does not fall within the proscribed definition. To uphold his conviction, the lower courts were required to place a strained, unforeseeable and indefensible construction on the statutes in question.

"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* When an unforeseeable construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his conduct constitutes a crime. *Bouie v. City of Columbia*, 378 U.S. 355, 84 S. Ct. at 1703.

Of course, this court has reviewed circumstances in which judicial expansions and interpretations of statutes did not offend the due process clause. For instance, in *Rogers v. Tennessee*, __ U.S. __ , 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), this court held that a state did not violate the due process clause when it abrogated the common law rule that a homicide victim must expire within a year-and-a-day of the act that caused his death in order for the perpetrator to be convicted of murder. The court reasoned that the judicial expansion of the rule was not indefensible and that the perpetrator could not possibly have relied on the common law rule when he committed the acts that caused the decedent's death. Nonetheless, *Rogers* sharply divided this court with four dissenting justices and two dissenting opinions.

Mr. Love's case is much different than the facts of *Rogers*. In this case, Mr. Love could easily have relied, as would any person of reasonable intelligence, that a statute that makes it a crime to conceal would not punish a disclosure. Likewise, Mr. Love could easily rely, as would any person of reasonable intelligence, that truthful, accurate disclosures of the various applications and expenditures of a bankrupt's funds would negate any claim that the funds were embezzled. Yet, in spite of this, Mr. Love remains convicted of concealing assets that were disclosed and embezzling assets from which he received not a single cent and which were likewise disclosed to the bankruptcy court.

The crux of the issue is best described by Justice Stevens in his brief but direct dissent in *Rogers*. Echoing the Ex Post Facto concerns that run through most fair warning cases, Justice Stevens stated that "For me, far more important than the historical issue is the fact that the majority has undervalued the threat to liberty that is posed whenever the criminal law is changed retroactively." *Rogers*, __ U.S. at __, 121 S. Ct. at 1703. In this case, Mr. Love has been convicted of a crime that was made by an unexpected and indefensible judicial construction of statutes that did not define his conduct as a crime when it was committed. Criminal laws are created by legislatures not judges. The statutes in question in this case were created by United States Congress and simply do not define Mr. Love's conduct as criminal. For this reason, Mr. Love respectfully requests that this court grant his petition for certiorari.

CONCLUSION

For the reasons set forth above, the petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JUNE 20, 2001

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 00-6083
(D.C. No. 98-CR-164-R)
(W.D. Okla.)

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SAMUEL BRUCE LOVE,

Defendant – Appellant.

ORDER AND JUDGMENT*

Before **LUCERO** and **McKAY**, Circuit Judges, and **BROWN**,** District J.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This Court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable Wesley E. Brown, Senior District Judge for the United States District of Kansas, sitting by designation.

Appendix A

Appellant Samuel Bruce Love appeals from his convictions for conspiracy, 18 U.S.C. § 371, concealment of the assets of a bankruptcy estate, 18 U.S.C. §§ 152 & 2, and embezzlement against a bankruptcy estate, 18 U.S.C. §§ 153 (1993) & 2. The parties are familiar with the facts, or at least with their respective competing versions, thus we need not set them forth here.[1] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I

Love first argues that the district court erred in refusing to dismiss the indictment or, alternatively, that the court erred in refusing to grant his motion for judgment of acquittal.[2]

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1. Love acknowledges the "voluminous trial record [that] will be cumbersome for this Court to review" and expresses a "fear" that it would be "easy . . . for this Court to make a simple statement that it has reviewed the evidence and that Mr. Love's conviction is sustained by the evidence." (Appellant's Reply Br. at 1-2.) Although the record is certainly voluminous, it is by no means prohibitive of our meaningful review of this appeal. We painstakingly reviewed the record, as we always do, and although our written disposition may be brief it does not reflect the amount of judicial time and effort dedicated to our ultimate determination.

2. The jury found Love guilty, and the district court entered judgment, on the following counts of the indictment: count 1, conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371; count 3, aiding and abetting concealment of $270,000 of the bankruptcy estate in violation of 18 U.S.C. §§ 152 and 2; count 4, aiding and abetting concealment of $38,000 of the bankruptcy estate in violation of 18 U.S.C. §§ 152 & 2; and counts 5 ($20,000), 6 ($9519.13), 7 ($32,275.31), 9 ($10,000), and 10 ($5000), aiding and abetting embezzlement against the bankruptcy estate in violation of 18 U.S.C. §§ 153 (1993) & 2.

In support of this contention, Love asserts that the evidence was insufficient to prove the alleged offenses were committed or that Love conspired to commit the offenses, that counts 3 and 4 were barred by the statute of limitations, and that the evidence was insufficient to support convictions on counts 5-10 under 18 U.S.C. § 153 (1993).

Generally, we review the grant or denial of a motion to dismiss an indictment for an abuse of discretion, *United States v. Wood*, 6 F.3d 692, 694 (10th Cir. 1993); however, when the sufficiency of a charge is challenged we review the district court's decision de novo, *United States v. Wood*, 958 F.2d 963, 974 (10th Cir. 1992). Similarly, we review the district court's ruling on a motion for judgment of acquittal and the sufficiency of the evidence to support such judgment de novo. *United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir. 2000). We inquire " 'only whether taking the evidence — both direct and circumstantial, together with the reasonable inferences to be drawn therefrom — in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt.' " *Id.* (quoting *United States v. Hanzlicek*, 187 F.3d 1228, 1239 (10th Cir. 1999)). The scope of our review is limited; we may " 'neither weigh conflicting evidence nor consider the credibility of witnesses.' " *Id.* (quoting *United States v. Pappert*, 112 F.3d 1073, 1077 (10th Cir. 1997)). "Defendants challenging a conviction on sufficiency of the evidence grounds face a difficult standard of review as we reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Spring*, 80 F.3d 1450, 1459 (10th Cir. 1996) (citations and quotations omitted). We will not, however,

uphold a conviction "obtained by nothing more than piling inference upon inference or where the evidence raises no more than a mere suspicion of guilt." *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (citations and quotations omitted). Finally, we review de novo the district court's determination regarding the applicable statute of limitations. *Laurino v. Tate*, 220 F.3d 1213, 1216 (10th Cir. 2000).

We conclude that a reasonable trier of fact could have found the essential elements of the offenses and could have found that Love conspired to commit the alleged offenses beyond a reasonable doubt. With regard to the conspiracy charges, there was direct evidence that Love was aware of the plan to commit bankruptcy fraud and willingly agreed to participate in that plan. *Cf. Rahseparian*, 231 F.3d at 1262-64 (reversing appellant's convictions for conspiracy to commit mail and wire fraud because there was no direct evidence of appellant's knowledge of the fraud and the circumstantial evidence of knowledge presented was not sufficient for a reasonable jury to find knowledge beyond a reasonable doubt). James Ray testified at trial that Love participated in the meeting at which the First Assurance & Casualty Company ("FACC") principals discussed what to do with the Sphere Drake refund and determined to transfer the $270,000 refund to a Panamanian account. He further testified that the meeting participants were explicitly made aware of the possibility that such a transfer may be bankruptcy fraud. We can not second-guess the jury's assessment of Ray's credibility. His testimony was direct evidence of Love's knowledge of and participation in the conspiracy to commit bankruptcy fraud.

Similarly, the evidence at trial was sufficient to support the charges of and convictions for concealment of the assets of a bankruptcy estate under 18 U.S.C. § 152 and for embezzlement or transfer of the assets of a bankruptcy estate under 18 U.S.C. § 153 (1993). Section 152 makes it unlawful for any person to "knowingly and fraudulently conceal[ ] . . . in connection with a case under title 11, from creditors . . . *any property* belonging to the estate of a debtor." 18 U.S.C. § 152(1) (emphasis added). Section 153 makes it unlawful for certain individuals to "knowingly and fraudulently . . . embezzle[ ] . . . or transfer[ ] any property . . . belonging to the estate of a debtor." 18 U.S.C. § 153 (1993).[3] The counts of concealment and embezzlement were supported by, among many other facts, the following: Ray's testimony that the participants in the meeting discussing the Sphere Drake refund voiced their intent to conceal the $270,000 from the bankruptcy estate, the odd method in which the $270,000 refund was received from Sphere Drake,[4] the substantial evidence presented at trial that Love was a principal of FACC (specifically the chief financial officer), testimony that Love helped prepare the bankruptcy reports by providing relevant information (*see, e.g.*, VII Trial Tr. at 1159, 1172, 1184, 1214 (Testimony of John Patterson,

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3. The Court is aware of the amendments to 18 U.S.C. § 153 that occurred in October 1994, and of the fact that Love was charged under the earlier version of that statute. The effect of those amendments is discussed later in this order and judgment.

4 The refund was first sent to Maynard's Kansas home payable to his company, "Advisor Associates, Inc.," then to an account of "Asset Protection Services Corporation" in Panama, then finally to an Impact III ("Impact") account in Oklahoma.

FACC's Bankruptcy attorney)), testimony that Love was directly informed by FACC's bankruptcy attorney of the operating requirements of the bankruptcy court (*id.* at 1167), the delayed reporting to the bankruptcy court of the transfers of FACC funds to Impact accounts, the fact that the transferred FACC funds were almost entirely depleted by the time the Impact "assets" were consolidated into the bankruptcy estate, and the misrepresentations to the bankruptcy court of the nature of the transfers of FACC funds (e.g., deeming transfers of funds as "reimbursements" or "reimbursements" as "consulting fees"). A reasonable jury could have concluded, beyond a reasonable doubt, that the principals of FACC, and specifically Love, transferred money to accounts of FACC's alter ego, Impact, in order to conceal FACC's property from its creditors and/or that such transfers were fraudulent.[5]

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5. Love cites *United States v. Turner*, 725 F.2d 1154 (8th Cir. 1984), in support of the assertion that the "mere transfer of assets is insufficient to sustain a conviction for bankruptcy fraud" and that the government must prove "intent to conceal." (Appellant's Br. at 22.) *Turner*, however, supports Love's conviction because it upholds a broad interpretation of "concealment." In *Turner*, the Eighth Circuit affirmed the district court's instruction on the meaning of "concealment," concluding that "concealment means more than 'secreting'; . . . [i]t is enough that one withholds knowledge, or prevents disclosure or recognition." *Id.* at 1156 (quotations omitted).

In this case, the fact that the transfer of FACC funds to Impact was disclosed does not overcome the finding that assets were concealed. Disclosure of the transfers was incomplete and the purposes of the transfers were falsely identified. As such, the bankruptcy reports Love cites as listing the transfers actually worked

(Cont'd)

We also affirm the district court's conclusion that counts 3 and 4 involved concealments and were "continuing offenses for which the limitation period does not begin to run until the final discharge or denial of discharge." 18 U.S.C. § 3284. Love's argument that the counts involved transfers, not concealments, fails because FACC did not relinquish control of the assets transferred to Impact accounts, or at least there was sufficient evidence for a reasonable jury to arrive at that conclusion. *See In re Brown*, 108 F.3d 1290, 1293 (10th Cir. 1997) ("There is little question that if an individual transfers *title* of an item but continues to exercise dominion over it, that fraud could be inferred."). As the bankruptcy court concluded in its July 29, 1994, order holding that FACC and Impact were alter egos, "Impact . . . had no source of income other than monies received from [FACC], . . . the finances of the two entities were commingled, . . . the principals of both entities were essentially identical, and . . . Impact . . . essentially functioned as a conduit to facilitate the transfer of funds from [FACC] to insiders and other entities." *In re First Assurance & Cas. Co.*, No. 93-16187-TS (Bankr. W.D. Okla. July 29, 1994).

(Cont'd)
to "prevent disclosure" to the bankruptcy court and to the creditors of the fact that Impact was an alter ego of FACC and that any Impact assets should have been property of the bankruptcy estate. Along the same lines, mere disclosure of the transfers of FACC assets to Impact does not prevent such transfers from being deemed "concealments" for purposes of § 152. Section 152 prohibits concealing "from creditors . . . *any property* belonging to the estate of a debtor." 18 U.S.C. § 152(1) (emphasis added). The disclosure of the transfers to Impact did not somehow make legal the removals of FACC assets from the bankruptcy estate. Those removals worked to "conceal" assets of the bankruptcy estate from creditors in violation of § 152.

We further conclude that the evidence was sufficient to support convictions for counts 5-10 under 18 U.S.C. § 153 (1993) and 18 U.S.C. § 2.[6] Although Love correctly observes that the version of § 153 in effect in 1993, when the alleged offenses occurred, required appropriation, embezzlement, spending, or transferring of property that came into one's charge as trustee or other officer of the court, he omits that he was indicted under 18 U.S.C. § 2 as well. Under § 2, whoever "aids, abets, counsels, commands, induces or procures" commission of an offense "is punishable as a principal." As Love concedes, Maynard was in the class envisioned by the prior version of § 153. (*See, e.g.*, Appellant's Br. at 26 ("The government's evidence clearly demonstrated that Mr. Maynard may have occupied such a position with the court . . . .").) Moreover, we do not read the prior version of § 153 to require appropriation of funds to one's own use; the plain language of the statute prohibits knowing and fraudulent embezzlement, spending, transference, etc., whether or not such activity is occasioned toward the offender's own use.

II

Love argues that the district court abused its discretion by admitting into evidence tape recordings of conversations between an FBI agent and Love involving an unrelated

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6. 18 U.S.C. § 153 (1993) states "[W]hoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secrets or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined . . . or imprisoned . . . ."

investigation. We review the district court's admission of evidence for abuse of discretion, *United States v. McIntosh*, 124 F.3d 1330, 1338 (10th Cir. 1997), and we affirm. The district court considered the parties' arguments regarding relevance before admitting the tapes or the agent's testimony regarding the recorded conversations. The court concluded that the conversations were "very probative of Mr. Love's involvement in [FACC] o[r] . . . at least [of his] asserted position of control . . . . [His position in the company is] obviously a serious question, . . . and [in the conversations] he's offering to do some pretty big things for the company." (VII Trial Tr. at 1119-20.)[7] Accordingly, the court issued a cautionary instruction to the jury limiting their consideration of the tapes only as it pertained to Love's "position and authority with [FACC]." (*Id.* at 1133.) Under these circumstances, we can not conclude that the district court abused its discretion by admitting the tapes into evidence.

III

The district court denied Love's motion for severance, and Love challenges that decision as an abuse of discretion. *United States v. Eads*, 191 F.3d 1206, 1209 (10th Cir. 1999), *cert. denied*, 530 U.S. 1231 (2000). In order to prevail, Love must show that actual prejudice resulted from the denial of his motion. *Id.* Because "severance is a matter of discretion and not of right, the defendant must bear a heavy burden of

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7. Indeed, on appeal Love asserts he "had no influence over the affairs of the failed insurance company nor over any matters that were reported or not reported to the Bankruptcy Court" and that he was only "an independent contractor for a failed insurance company." (Appellant's Br. at 3, 4.)

showing real prejudice to his case." *United States v. Petersen*, 611 F.2d 1313, 1331 (10th Cir. 1979). Love has not met this burden; after reviewing the parties' arguments and the relevant authorities, we conclude the district court did not abuse its discretion in denying his request for severance. Our conclusion is based upon, among other facts, the district court's issuance of cautionary jury instructions to consider each count and each defendant separately (II Appellee's Supp. App. at 120-21), and the jury's ability to compartmentalize evidence as demonstrated by the acquittal of Jones on the only count charged against her and the acquittal of Love and Maynard on counts 2 and 8. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 541 (1993); *United States v. Wacker*, 72 F.3d 1453, 1468 (10th Cir. 1995); *United States v. Cardall*, 885 F.2d 656, 668 (10th Cir. 1989).

IV

Love claims the evidence was insufficient to support a verdict as to any count of the indictment. We review de novo the issue of whether there was a fatal variance between the allegations of the indictment and the evidence presented at trial. *United States v. Williamson*, 53 F.3d 1500, 1512 (10th Cir. 1995). "A variance is fatal only when the defendant is prejudiced in his defense because he cannot anticipate from the indictment what evidence will be presented against him or is exposed to the risk of double jeopardy." *Id.* at 1513 (quotation omitted). "[T]he prohibition against variances is designed to insure notice of the charges" and derives from the Sixth Amendment right that an accused "be informed of the nature and cause of the accusation." *Id.* at 1513, 1512 n.4.

Appendix A

As requested by appellant, we have reviewed the closing arguments of the government's counsel; we have also reviewed the indictment[8] and the trial record in general. The indictment made clear that the government intended to offer, as proof of the conspiracy to commit bankruptcy fraud, evidence of the management or mismanagement of FACC. (*See, e.g.*, I Appellee's Supp. App. at 42, Superseding Indictment ¶ 18 ("It was part of the conspiracy that the defendants acquired money through the sale of insurance policies to individuals in the United States through FACC without maintaining sufficient funds necessary to pay claims of its policyholders.").) The trial transcript reveals that there was no fatal variance between the indictment and trial. Appellant had notice that evidence of FACC's mismanagement would be admitted at trial, and accordingly his defense was not prejudiced.

V

During sentencing, the district court applied several upward adjustments under the Sentencing Guidelines to increase Love's base offense level.[9] Love challenges the application of the adjustments for loss under U.S.S.G. § 2F1.1(b)(1), violation of the automatic stay in bankruptcy

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8. Despite raising this variance claim, appellant did not provide us with a copy of the indictment. Under 10th Cir. R. 10.3(B) we may therefore decline to consider the issue. To assure ourselves, we nevertheless consider the claim.

9. The district court used the 1993 Sentencing Guidelines. Therefore, all references to the Guidelines in this order and judgment are to the 1993 version.

under U.S.S.G. § 2F1.1(b)(3)(B), and abuse of a position of trust or use of a special skill under U.S.S.G. § 3B1.3. We review de novo the district court's interpretation and application of the Sentencing Guidelines. *United States v. Burridge*, 191 F.3d 1297, 1301 (10th Cir. 1999). We review for clear error the factual findings supporting a district court's offense level calculation and will reverse "only if we have a definite and firm conviction that a mistake has been made." *United States v. Messner*, 107 F.3d 1448, 1456 (10th Cir. 1997) (quotation omitted).

A. Loss: § 2F1.1(b)(1)

Sentencing Guideline § 2F1.1 provides for an increase in the base offense level dependent on the amount of loss in a crime of fraud. Application note 7 states that "loss is the value of the money [or] property . . . unlawfully taken" and that "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1, cmt. 7. The application notes also state that "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." *Id.* cmt. 8. Accordingly, in *Messner* we concluded that where the "intended loss is greater than the actual loss resulting from [defendant's] conduct, a court will use the greater, intended loss amount for the purpose of sentencing." 107 F.3d at 1456. The district court heard testimony that the intended loss was more than $81 million.

Were we to apply Love's valuation method, taking the lesser of the value of the assets concealed or the value of the

debtor's liabilities, we would nevertheless affirm the district court's application of § 2F1.1. The court heard testimony that the amount concealed in bankruptcy, including the amount associated with the conspiracy count, was upwards of $7 million. The court concluded that the $7 million figure was less than FACC's liabilities and used that number to calculate loss for purposes of § 2F1.1. We do not conclude that the court's estimate of loss was unreasonable or clearly erroneous.[10]

B. Abuse of Process: § 2F1.1(b)(3)(B)

Love also challenges the district court's imposition of a two-level upward adjustment to his base offense level for "violation of any judicial or administrative order, injunction, decree or process" under U.S.S.G. § 2F1.1(b)(3)(B). In *Messner*, this Court joined the Seventh, Eighth, and Eleventh Circuits and held that an enhancement under § 2F1.1(b) "is proper for defendants convicted of bankruptcy fraud." 107 F.3d at 1457. We reasoned that bankruptcy fraud involves "abus[ing] the bankruptcy process by concealing estate assets." *Id.* (quotation omitted). Although our holding in *Messner* connected the abuse of process rationale to defendant's action in seeking "protection from *his [or her]* creditors under the shelter of bankruptcy," *id.* (emphasis

10. The court was not required to use the intended loss projections here because it reasonably determined that those projections were unreliable. (XVII Trial Tr. at 2688 (court stating "I just don't buy the $84 [sic] million figure").) U.S.S.G. § 2F1.1, cmt. 7 ("if an intended loss that the defendant was attempting to inflict *can be determined*, this figure will be used if it is greater than the actual loss.") (emphasis added).

added), we decline to limit application of the abuse of process adjustment for bankruptcy fraud to the debtor or debtor-in-possession. The jury found that Love conspired to commit bankruptcy fraud and convicted him for concealment and embezzlement of the assets of the bankruptcy estate. *See* 18 U.S.C. § 2 ("whoever . . . aids [or] abets . . . is punishable as a principal."). Thus, at the very least, Love aided Maynard in violating the automatic stay and thereby abused the bankruptcy process. As such, the *Messner* rationale applies and the district court did not err in applying a two-level upward adjustment to Love's sentence under § 2F1.1(b)(3)(B).

C. Abuse of Position of Trust: § 3B1.3

The final challenge Love makes is to the court's adjustment for abuse of position of trust under Sentencing Guideline § 3B1.3. "Abuse of position of trust is a sophisticated factual determination that will be affirmed unless clearly erroneous." *United States v. Williams*, 966 F.2d 555, 557 (10th Cir. 1992) (quotation omitted).

Application note 1 to § 3B1.3 explains that " '[p]ublic or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature." In *Williams* we set forth a number of factors that can be considered in determining whether a defendant was in a "position of trust." 966 F.2d at 557. Those factors include, but are not limited to:

> the extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed; defendant's duties as compared to those of other employees; defendant's level of specialized knowledge; defendant's level of authority in the position; and the level of public trust.

Id. (footnotes omitted). We evaluate whether one has abused a position of trust from the point of view of the victim. *United States v. Trammel*, 133 F.3d 1343, 1355 (10th Cir. 1998).

Love argues that he did not occupy a position of trust with either the insurance policy holders or the bankruptcy court and thus the enhancement for abuse of position of trust was improperly applied to him. In support of his contention that he occupied no position of trust with the policyholders he states that he never "had a single conversation or communication with a single policyholder." (Appellant's Br. at 38.) Under *Williams* and the application notes to § 3B1.3, such interaction is not required so long as defendant has sufficient managerial discretion. After listening to the parties' arguments both at trial and sentencing, the court explicitly found that Love occupied such a role, and we do not conclude that its finding was clearly erroneous.[11]

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11. In overruling Love's objection to the adjustment the court found that both Maynard and Love "were officers in insurance companies or related entities and they had certainly — I can't imagine a more significant trust relationship than the officer of an insurance company with their policyholders, and the ultimate loser

(Cont'd)

We emphasize that the relevant trust relationship here could be either that between Love and the policyholders or Love and the bankruptcy court. Love erroneously states that the "pertinent relationship involved in the alleged crime was the relationship between the defendants and the Bankruptcy Court." (Appellant's Br. at 37.) His reading of the scope of the Guidelines is too narrow. "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 . . . and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. Ch. 3, pt. B, introductory cmt. Guideline § 1B1.3(a) states that enhancements "shall be determined on the basis of . . . all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *See also United States v. Guidry*, 199 F.3d 1150, 1159 (10th Cir. 1999). Thus, regardless of whether Love assumed a position of authority with the bankruptcy court, the court's finding that Love abused his position of trust with the insurance policy holders was sufficient to justify application of the § 3B1.3 adjustment. Although the bankruptcy court certainly was a "victim" of the bankruptcy fraud, the real victims were the creditors, and the creditors were the insurance policyholders.

(Cont'd)
in this was the policyholders." (XVII R. at 2728). The court also found that Maynard and Love held "positions of trust in regard to the work they were doing post-bankruptcy, and they violated that trust." (*Id.*)

Appendix A

VI

Finally, Love challenges his sentence on the basis of the Supreme Court's decision in *Apprendi v. New Jersey*, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). There is simply no ground for his argument because he was not sentenced in excess of any of the statutory maximums for the eight counts on which he was convicted. A district court has "broad discretion" in choosing whether to run multiple terms of imprisonment concurrently or consecutively. *United States v. Johnson*, 40 F.3d 1079, 1082 (10th Cir. 1994); 18 U.S.C. §§ 3584(b), 3553. Sentencing Guideline § 5G1.2(d), however, dictates that in cases where multiple terms of imprisonment are imposed, "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."

In Love's case, the district court calculated a total offense level under the Sentencing Guidelines of 26 and a Criminal History Category of I to arrive at an imprisonment range of sixty-three to seventy-eight months. The longest statutory maximum for any of the eight counts on which Love was convicted was five years (i.e., sixty months). Sixty months was three months short of the lower end of the range provided by the Sentencing Guidelines. Thus, the district court sentenced Love to serve seven *concurrent* terms of sixty

months and one *consecutive* term of seven months for a term near the low end provided by the Guidelines. This sentence does not run afoul of *Apprendi* because Love was not sentenced in excess of the statutory maximum term for any of the eight counts on which he was convicted.

VII

For the reasons set forth above, we **AFFIRM**.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED AND FILED FEBRUARY 25, 2000

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case Number: CR. 98-164-3-R

UNITED STATES OF AMERICA

v.

SAMUEL BRUCE LOVE
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Keith Ward
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 3, 4, 5, 6, 7, 9, & 10 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	Conspiracy to commit bankruptcy fraud, a Class D felony	10-21-98	1
18:152 & 2	Concealment of assets, aiding and abetting, a Class D felony		3 & 4
18:153 & 2(b)	Embezzlement against estate, aiding and abetting, a Class D Felony		5,6,7,9, & 10

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2 and 8 and is discharged as to such count(s).

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 436-38-5049	
Defendant's Date of Birth: 7-10-35	February 24, 2000 Date of Imposition of Sentence
Defendant's USM No.: 43926-008	s/ David L. Russell Signature of Judicial Officer
Defendant's Mailing Address: 8701 E. Camino Real Scottsdale, AZ 85255	DAVID L. RUSSELL, CHIEF U.S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Residence Address: Same	February 25, 2000 Date ENTERED IN JUDGMENT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-seven (67) months. Sixty (60) months on Ct. 1 and Seven (7) months on Count 3, such terms to run consecutively; Sixty (60) months on Counts 4, 5, 6, 7, 9 & 10, all to run concurrently with Counts 1 and 3.

☒ The court makes the following recommendations to the Bureau of Prisons:

The defendant be incarcerated at Fort Worth, Texas.

* * *

Appendix B

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☒ before noon on March 27, 2000.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on Counts 1, 3, 4, 5, 6, 7, 9, & 10 all to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the following additional conditions:

☒ The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

* * *

☒ The defendant shall not possess a firearm or destructive device as defined in 18 U.S.C. § 921.

For offenses committed on or after September 13, 1994:

☒ The defendant shall refrain from any unlawful use of a controlled substance.

Appendix B

☒ The defendant shall notify the probation office 10 days prior to any change in residence or employment.

☒ The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation office.

* * *

☒ The defendant shall disclose all assets and liabilities to the probation office. The defendant shall not transfer, sell, give away or otherwise convey any asset without first consulting with the probation office.

☒ The defendant shall, upon request of the probation office, authorize release of any and all financial records, income tax records and social security records, by execution of a release of financial information form, or by any other appropriate means.

☒ The defendant shall maintain a single checking account in his/her name. The defendant shall deposit into this account all income, monetary gains, or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other bank accounts must be disclosed to the probation office.

☒ The defendant shall not make application for any loan or enter into any credit arrangement without first consulting with the probation office.

Appendix B

☒ If the defendant maintains interest in any business or enterprise, the defendant shall, upon request, surrender and/or make available for review, any and all documents and records of said business or enterprise to the probation office.

If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties Sheet of this judgment. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

Appendix B

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptance reasons;

6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	**Restitution**
Totals:	$100 on each count for a total of **$800.00**	$7,000,000

* * *

RESTITUTION

* * *

☒ Restitution is ordered joint and several with any other defendants. Payments shall be forwarded to Janice Loyd, Bankruptcy Trustee, 2050 Oklahoma Tower, 210

Park Avenue, Oklahoma City, Oklahoma 73102. Payments to be distributed to the bankruptcy creditors as received by the bankruptcy trustee.

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

Appendix B

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Objection to use of 1998 guidelines manual sustained. Court finds 1993 guideline manual appropriate. Objection to paragraph 34 sustained. Objection to loss amount sustained. Court finds loss is $7,000,000.

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: 2 to 3 years

Fine Range: $12,500 to $125,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $7,000,000

* * *

Appendix B

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 10, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-6083

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SAMUEL BRUCE LOVE,

Defendant – Appellant.

ORDER

Filed July 10, 2001

Before **LUCERO** and **McKAY**, Circuit Judges, and **BROWN***, District Judge.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel

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* The Honorable Wesley E. Brown of the United States District Court for the District of Kansas, sitting by designation.

and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Opal A. Carter
Deputy Clerk

APPENDIX D — ABSTRACT OF REPORTS OF FIRST ASSURANCE & CASUALTY COMPANY, LTD. FILED WITH THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED JANUARY 19, 1994 AND FILED JANUARY 20, 1994

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Bankruptcy No: 93-16187-TS
Chapter 11

In re:
First Assurance & Casualty Company, Ltd.

Debtor(s).

INITIAL REPORT

COMES NOW, First Assurance & Casualty Company, Ltd., Debtor-in-Possession, and hereby submits its Initial Report as shown by the attached Exhibits consisting of 21 pages and containing the following, as indicated:

☒ Balance Sheet as of the date of the Order for Relief. Exhibit "1".

☒ Income Statement for the thirty (30) day period immediately preceding the date of the Order for Relief. Exhibit "2".

☒ Insurance, Tax and Cash Collateral Statements. Exhibit "3".

Appendix D

☒ Four (4) month projection from operations. Exhibit "4".

☒ Designation of individual responsible for discharging Debtor's duties. Exhibit "5".

☒ Designation of individual responsible for Financial Reports. Exhibit "6".

☒ Receipt and certificate concerning operating requirements. Exhibit "7".

☒ Debtor's Section 345 Bank Account Certificate. Exhibit "8".

I DECLARE UNDER PENALTY OF PERJURY THAT THIS REPORT AND ATTACHMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DEBTOR-IN-POSSESSION

DATE: 1/19/94

BY: s/ Jesse J. Maynard
NAME: Jesse J. Maynard
TITLE: President
ADDRESS: 11605 W. 156th Terrace
Overland Park, KS 66621
TELEPHONE: (913) 681-5308

Appendix D

EXHIBIT "2"

First Assurance & Casualty	
	10/31/93
Earned Premium	8,335,135.44
Interest Income	6,923.24
Surety Income	159,082.41
Reinsurance Premium	270,000.00
Interest on Debentures	25,000.00
	8,796,141.09
Direct Expenses	
Commission Expense	1,838,899.97
Claims	3,759,834.56
Legal Adjusting Expenses	2,880,390.92
Reinsurance	150,000.00
	8,629,125.45
	167,015.64
Other Expenses	
Consulting	1,061,797.78
Contract Labor and Bonuses	3,379.00
Auto Expenses	16,437.43
Rental Expense	5,891.20
Mexico Office Expense	87,535.06
Management Fees	637,528.28
Office Supplies and Expense	13,003.81
Data Processing	26,371.98
Printing	4,336.33
Life & Health Insurance	33,100.70
Travel and Entertainment	72,923.73
Transportation	32,864.50
Lodging	1,729.46
Meeting Expense	4,878.31

Appendix D

Legal Fees	184,582.31
Accounting Fees	101,803.18
Postage & Express	12,979.85
Repairs & Maintenance	120.00
Dues and Subscriptions	535.00
Advertising	295.02
Moving Expense	4,885.97
Telephone	28,717.84
Training & Conferences	1,575.00
Bank Charges	1,988.40
Interest Expense	90,625.00
Debenture Interest Expenses	430,424.24
Equipment Rental	523.80
Loss on Sale of Securities	3,096.95
Freight	356.59
Total Other Expenses	2,864,286.72
Net Income (Loss)	(2,697,271.08)
Retained Earnings — Beginning of Year	1,219,647.98
Retained Earnings — End of Period	(1,477,623.10)

Appendix D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Bankruptcy No: 93-16187TS
Chapter 11

In Re: FIRST ASSURANCE AND
CASUALTY CO. LTD.,

Debtor.

MONTHLY OPERATING REPORT FOR MONTH
ENDING NOVEMBER 30, 1993

COMES NOW, First Assurance and Casualty Co. LTD, Debtor-in-Possession, and hereby submits its Monthly Operating Report for the period commencing Nov. 1, 1993 and ending Nov. 30, 1993 as shown by the report and exhibits consisting of 36 pages and containing the following, as indicated:

☒ Section 1106 Report

☒ Monthly Reporting Questionnaire (Exhibit "A")

☒ Monthly Income Statement (Exhibit "B")

☒ Balance Sheet as of end of month (Exhibit "C")

☒ Cash Receipts and Disbursements Summary and Statements (Exhibit "D")

Appendix D

☒ Statement of Aged Accounts Receivables (Exhibit "E")

☒ Statement of Aged Accounts Payable Post-Petition only (Exhibit "F")

☒ Statement of payments to secured creditors (Exhibit "G")

Appendix D

First Assurance & Casualty

Disbursements

Date	Payee	Check Number	Amount	
11/08/93	Norwest Bank		81.52	Checks
11/15/93	Norwest Bank		17.50	Deposit Slips
11/15/93	Norwest Bank		26.04	Deposit Slips
11/16/93	Norwest Bank		165.79	Returned Check
11/19/93	Norwest Bank		2.00	Service Charge
11/29/93	Norwest Bank		231.00	Returned Check
11/30/93	Norwest Bank		2.00	Service Charge
11/01/93	Impact III	T1	20,000.00	Consulting Fee
11/02/93	Impact III	T2	9,519.13	Consulting Fee
11/18/93	Impact III	1,001.00	32,275.31	Consulting Fee
Total Disbursements Norwest Bankruptcy Trust			62,320.29	
01/09/93	Impact III		240,000.00	Consulting Fee
01/09/93	Jess Maynard		25,000.00	Reimbursement
Disbursements from Trust Account			265,000.00	

Appendix D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Bankruptcy No: 93-16187TS
Chapter 11

In Re: FIRST ASSURANCE AND CASUALTY CO., LTD.,

Debtor.

MONTHLY OPERATING REPORT FOR MONTH ENDING DECEMBER 31, 1993

COMES NOW, First Assurance and Casualty Co., Ltd., Debtor-in-Possession, and hereby submits its Monthly Operating Report for the period commencing Dec. 1, 1993 and ending Dec. 31, 1993 as shown by the report and exhibits consisting of 23 pages and containing the following, as indicated:

☒ Section 1106 Report

☒ Monthly Reporting Questionnaire (Exhibit "A")

☒ Monthly Income Statement (Exhibit "B")

☒ Balance Sheet as of end of month (Exhibit "C")

☒ Cash Receipts and Disbursements Summary and Statements (Exhibit "D")

Appendix D

☒ Statement of Aged Accounts Receivables (Exhibit "E")

☒ Statement of Aged Accounts Payable Post-Petition only (Exhibit "F")

☒ Statement of payments to secured creditors (Exhibit "G")

Appendix D

First Assurance & Casualty

Cash Disbursements

Date	Payee	Check Number	Amount	
12/01/93	Frontier Administrators	1002	4,081.74	Consulting Fee
12/09/93	Impact III	1003	10,000.00	Consulting Fee
12/14/93	Impact III	1004	5,000.00	Consulting Fee
Disbursements Norwest Bankruptcy Trust			19,081.74	

Cash disbursements 12/1 through 12/31